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No. 04-265

Supreme Court, U.S.
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In The
Supreme Court of the United States

MAJEED ALTAMIMI,

Petitioner,

v.

DANIEL J. BRABENDER, JR., W. RICHARD COWELL, JOHN R. WINGERTER, LEE C. FULLER, TED J. PADDEN, DONALD J. ROGALA, BRADLEY K. ENTERLINE, MARY PAYTON JARVIE, individuals, and CARNEY & GOOD, a professional partnership,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

1. Whether the state court properly dismissed a state law legal malpractice action as time barred where the Petitioner had filed his action more than six years after the termination of the attorney-client relationship and more than six years after his sentencing?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER STATEMENT OF THE CASE

This is a state law claim for a legal malpractice under Pennsylvania law arising out of Petitioner's guilty plea to Indecent Sexual Assault and Corruption of a Minor. Petitioner, an immigrant from Iraq, was charged with Criminal Solicitation (18 Pa.C.S.A. §902), Indecent Sexual Assault (18 Pa.C.S.A. §3126) and Corruption of the Morals of a Minor (18 Pa.C.S.A. §6301) arising out of an incident occurring on January 19, 1995. Defendant Daniel Brabender, Jr., Esquire represented Petitioner in defense of the criminal charges filed against him. Defendant disputes that Petitioner asserted his innocence. Petitioner signed the plea agreement in connection with the matter on or about February 13, 1995 and testified regarding the plea on September 6, 1995. (Transcript of plea hearing, RR, p. 131a). The Petitioner testified at that hearing that he understood the plea agreement (RR, p. 137-138a), that he understood he was pleading guilty with no agreement as to sentencing (RR, p. 142a) and that he acknowledged he had spoken to his attorney and his interpreter about what was in the agreement (RR, p. 141a). As a result of the agreement, the charge of Criminal Solicitation was dropped and Petitioner pled guilty to the offenses of Indecent Sexual Assault and Corruption of the Morals of a Minor. Thereafter, Petitioner was sentenced to incarceration at a sentencing hearing on or about October 10, 1995. Defendant Brabender filed a Motion to Modify and Reduce Sentence on behalf of Petitioner which the court denied the very next day. After that ruling, but sometime before the end of October 1995, Petitioner terminated Mr. Brabender as his counsel.

After terminating Mr. Brabender as his counsel in October 1995, Petitioner did not file a direct appeal in the matter. However, Petitioner subsequently retained James Stuczynski, Esquire, in June of 1996. On June 3, Petitioner filed a Motion for Post Conviction Collateral Relief (PCRA) which was denied on November 25, 1996. Petitioner appealed and said appeal was denied on September 8, 1997. A Petition for Allowance of Appeal was filed to the Pennsylvania Supreme Court, which was denied on February 23, 1998.

As a consequence of Petitioner's guilty plea and incarceration on charges involving "moral turpitude," the Immigration and Naturalization Services (INS) served upon him an Order to Show Cause why he should not be deported. An INS hearing was held on October 21, 1997, and Petitioner was ordered to be deported. That decision was affirmed on February 5, 1999. Subsequently, in order to avoid the deportation, Petitioner filed a Petition for Habeas Corpus in the United States District Court for the Western District of Pennsylvania. It was in INS proceedings that the Petitioner for the first time raised his issues regarding the incontinence, impotence and loss of sexual functioning to attempt to show innocence. However, the sexual function was not an element of the underlying criminal charges. The magistrate judge originally recommended denying the Petition; however, after Petitioner filed objections to the Magistrate's Report, his Petition was granted. The Commonwealth of Pennsylvania did not oppose the Petition for Habeas Corpus as Petitioner had served all of his state court sentence and was no longer in the custody of the Commonwealth at the time his Petition was finally granted on August 21, 2001. Petitioner asserts that he was cleared of all the charges, when in fact, he was

not. To the contrary, the habeas corpus was granted allowing him to stay in the country.

Petitioner, on February 15, 2002, then filed this legal malpractice claim against Defendants, Mr. Brabender and the Law Offices of Carney & Good, more than six (6) years following his sentencing in state court on October 10, 1995 and Mr. Brabender's termination as Petitioner's counsel in October 1995.

REASONS FOR DENYING THE WRIT

I. Petitioner has not stated a claim for violation of equal protection or of due process

This Court has long held that "[s]tatutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). This Court consistently upholds the States' interest in eliminating stale claims. As this Court explained:

> Statutes of limitation . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Bowen v. City of New York, 476 U.S. 467, 482 n. 13 (1986); *American Pipe and Const. Co. v. Utah*, 414 U.S. 538, 554 (1974); *Order of Telegraphers v. Railway Exp. Agency*, 321 U.S. 342, 348-49 (1944). There is no absolute and unlimited constitutional right of access to courts, only reasonable access is necessary. *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548 (3d Cir. 1985). The statute of limitations in Pennsylvania, under 42 Pa.C.S.A. §5524, provides that negligence claims must be brought within two (2) years of the date the cause of action arises. The Pennsylvania Supreme Court in *Bailey v. Tucker*, 621 A.2d 108 (Pa. 1993) examined claims of legal malpractice and determined when the statute of limitations begins to run. As the statute of limitations does not treat similarly situated persons differently, is reasonably related to legitimate government interests, and the Petitioner was given reasonable opportunity to be heard, there is no federal constitutional violation here. The determination of when a state law cause of action arises is purely a matter of state law, and this Court should deny the Petition.

A. The statute of limitations here does not treat similarly situated persons differently

The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). Petitioner's claim here that the statute of limitations for a legal malpractice claim arising out of a criminal claim treats him differently than those arising out of other tort claims such as malicious prosecution or abuse of process. However, this is a misstatement of the law of Pennsylvania. The statute of limitations in this matter

treats the claimants identically and requires that the claim be brought within two years from the date the claim accrues. The law is clear in Pennsylvania that the statute of limitations in a legal malpractice action arising out of a criminal matter commences to run not later than the termination of the attorney-client relationship. *Bailey v. Tucker*, 621 A.2d 108 (Pa. 1993). In *Bailey*, *supra*, the court found that in the context of a criminal malpractice action, the time when the harm is suffered in the typical case is "easily identifiable, i.e., the date of sentencing." *Bailey*, 621 A.2d at 116. Nevertheless, the court recognized that in criminal proceedings the date the defendant is aware that counsel may have been responsible for the alleged harm is often harder to pinpoint. *Id.* Therefore, the court held that the appropriate starting point for the statute of limitations in a criminal malpractice suit is the termination of the attorney-client relationship since at that point the aggrieved defendant is aware of the injury and is on clear notice to investigate any alternative cause of that harm which he believes to exist. *Id.*

Although Petitioner argues that he must bring his claim prior to it accruing, this is simply not the case. In fact, Petitioner's cause of action accrues at the date of sentencing. At that point, duty, breach and harm have all occurred, according to the court in *Bailey*. The cause of action has accrued at that point. And moreover, the court in *Bailey* specifically addressed this element of the claim not as an element necessary for the prima facie case to file the suit, but rather that "a plaintiff **will not prevail in an action in criminal malpractice** unless and until he has pursued post-trial remedies and obtained relief which was dependent upon attorney error." Specifically addressing the Petitioner's issue, the court notes that "[t]his

requirement does not, however, relieve the plaintiff of his duty to initiate this cause of action within the statute of limitations period as hereinafter discussed." *Id.*, 621 A.2d at 115. While plaintiff may later be precluded from prevailing in a legal malpractice action because he cannot prove that he was innocent of the action and able to obtain post-sentencing relief, this does not mean his claim has not accrued. Rather, these are elements that, if not proven, break the chain of causation.

The claim for legal malpractice arising out of a civil action is identical in this respect. *Robbins & Seventko Orthopedic Surgeons, Inc. v. Geisenberger*, 674 A.2d 244 (Pa.Super. 1996). There, the plaintiff may later obtain relief in the appellate court which would prevent his recovery in the legal malpractice action because it breaks the chain of causation. However, as explained by the court in *Robbins*, this does not mean that the cause of action did not accrue. The court in *Robbins* explained the *Bailey* holding as follows:

> While the Court did require a plaintiff to pursue post-trial remedies and obtain the relief that was dependent on the attorney's errors before the malpractice claim was cognizable, it did not exempt the plaintiff from filing the action within the prescribed statute of limitations period. *Bailey*, 533 Pa. at 251 n. 13, 621 A.2d at 115 n. 13.

The Court explained:

> "[w]e recognize the concern about the amount of claims that might clog the civil dockets. However, we feel that it is more important that we require these criminal defendants to file their claims within the statutory period to prevent any injustice to an attorney who has to defend a claim of

> malpractice many years after his relationship with the client ends." *Bailey,* 533 Pa. at 252 n. 15, 621 A.2d at 115 n. 15. In those instances where the malpractice claim must be filed before the post conviction process was completed, the Court directed an attorney defendant to interpose a preliminary objection on the grounds of demurrer. The trial court was then instructed to reserve its ruling until the post conviction process was resolved. *Bailey*, 533 Pa. at 251 n. 13, 621 A.2d at 115 n. 13.

Robbins, 674 A.2d at 248. The court in *Robbins* then held that the statute of limitations in a legal malpractice action arising out of a civil matter was not tolled during the appeal process in that matter. Therefore, the rule in *Bailey* is in that manner no different for civil action claimants and the causes of action accrue when duty, breach and harm are present. Here, the Petitioner's cause of action accrued at the time he alleged that Mr. Brabender allowed him to enter into the plea agreement and when he was subsequently sentenced. All of this occurred in 1995. Therefore, his claim accrued in 1995. Further, there is no question that Petitioner was actually aware of the duty, breach and the actual harm at that point. He had been sentenced and he pleads in this matter that he had maintained his innocence throughout serving his sentence (although this fact is disputed). He was accordingly aware then at the time of his sentencing that he had pleaded guilty to a crime for which he was sentenced to jail and that he maintained he did not commit.

The instant matter is not a malicious prosecution action, nor is it a false arrest or imprisonment claim. Rather, this is a claim for legal malpractice arising out of a criminal matter, just as the claim in *Bailey*. The elements

of malicious prosecution and false imprisonment claims are very different than those of a legal malpractice action and the claimants are not similarly situated. In a legal malpractice action, a plaintiff is bringing a claim against his own lawyer, and the court in *Bailey* directly addressed the policy considerations involved in a criminal defendant suing his lawyer. The Court explained:

> Unlike in the civil litigation area, a client does not come before the criminal justice system under the care of his counsel alone; he comes with full panoply of rights, powers, and privileges. These rights and privileges not only protect the client from abuses of the system but are designed to protect the client from a deficient representative. Thus, whereas in a civil matter a case once lost is lost forever, in a criminal matter a defendant is entitled to a second chance (perhaps even a third or fourth chance) to insure that an injustice has not been committed. For these reasons we are constrained to recognize that criminal malpractice trespass actions are distinct from civil legal malpractice trespass actions, and as a result the elements to sustain such a cause of action must likewise differ.

Id. at 114. The Petitioner is claiming that his due process rights are being violated because he must file his legal malpractice action against his criminal attorney within two years from the date of the termination of the attorney-client relationship. His argument is that he has fewer rights than those bringing false imprisonment or malicious prosecution claims. However, in actuality, as the court addressed in *Bailey*, the criminal defendant comes with full panoply of rights, powers, and privileges as part of the criminal process designed to protect him from

deficient representation. Therefore, the statute of limitations began to run at Petitioner's sentencing on October 10, 1995. Pursuant to 42 Pa.C.S.A. §5524, a legal malpractice action in negligence must be brought within two (2) years of the date the cause of action arises. The instant action, brought by Petitioner more than six (6) years after the cause of action arose, is barred by the statute of limitations applicable in legal malpractice actions sounding in both negligence and contract.

As Petitioner cannot meet his burden that he was treated differently than similarly situated classes of persons. Petitioner was not denied due process, and this Petition should be denied.

B. The statute of limitations is rationally related to legitimate governmental interests

Even assuming Petitioner was treated differently, this statute of limitations is constitutional. In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, U.S. Const., Amdt. 14, §1, the Court applies different levels of scrutiny to different types of classifications. Under the rational basis standard of review, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne, supra*, 473 U.S. at 440; *See also U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); *Romer v. Evans,* 517 U.S. 620, 632-33 (1996).

The court in *Ciccarelli, supra*, examined the appellant's claim that the difference in the running dates of the statutes of limitations in the wrongful death action and survival action violated equal protection and due process

rights. The court held that it did not and stated that even statutes that in effect extinguish claims before they accrue can be constitutional. *Id.* The court noted that "[b]ecause statutory periods are in some sense arbitrary, the period to initiate suit occasionally expires before a claimant has sustained any injury, *See e.g. Jewson v. Mayo Clinic*, 691 F.2d 405, 411 (8th Cir. 1982); *See also Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 822-23 (2d Cir. 1952), or before the claimant knows he has sustained an injury, see, e.g., *Jewson*, 691 F.2d at 411; *Clark v. Gulesian*, 429 F.2d 405, 406 (1st Cir. 1970), cert. denied, 400 U.S. 993, 91 S.Ct. 461, 27 L.Ed.2d 441 (1971)." *Id.* 757 F.2d at 555. The court found that these statutes do not violate the constitution so long as the term is otherwise reasonable. *Id. See also Braswell v. Flintkote Mines, Ltd.*, 723 F.2d 527, 531 (7th Cir. 1983); *Mathis v. Eli Lilly & Co.*, 719 F.2d 134, 139 (6th Cir. 1983); *Jewson*, 691 F.2d at 411; *Ornstein v. Regan*, 604 F.2d 212, 214 (2d Cir. 1979).

The court in *Ciccarelli* also held that having different running times for different claims does not violate equal protection. The court stated:

> The distinction does not implicate a suspect class nor a fundamental right; consequently, if the distinction is rationally related to a legitimate government interest it does not violate equal protection. A distinction between wrongful death and survival actions, and those personal injury actions brought by living plaintiffs, is related to the state's interest – and those of the survivors – in the prompt settlement of the economic and legal affairs of the deceased. The state legislature may not be said to be irrational in encouraging a personal representative to bring suit promptly. Requiring all wrongful death and survival actions

> to be commenced within one and two years, respectively, of the decedent's death may well represent a conclusion by the state that the right to be free of state claims in time comes to prevail over the right to prosecute them even though this may lead to harsh results in some cases.

Id., 757 F.3d at 555-56.

Likewise, in the instant matter, Petitioner claims that the statute of limitations accrual established in *Bailey* violates the constitution because it treats claims against lawyers differently than it treats claims for malicious prosecution or false imprisonment. However, this implicates neither a suspect class nor a fundamental right. Therefore, so long as the distinction is rationally related to a legitimate government interest, it is constitutional. In *Bailey*, the Pennsylvania Supreme Court addressed the numerous government interests involved in litigation in claims against lawyers, and in particular, lawyers in criminal malpractice actions. Those interests included:

1) the threat of a malpractice action for representation of a criminal defendant will have a "chilling effect" on counsel's ability to defend his client fearlessly and independently;

2) as a consequence the system will have difficulty attracting and maintaining attorneys to represent persons charged with crime, and the retention of an attorney will become prohibitively expensive;

3) aggrieved defendants already have sufficient systemic remedies for attorney ineffectiveness such as appeals and post-conviction proceedings;

4) to permit such a cause of action will result in a flood of litigation; and

5) the existence of such a cause of action leads to the possibility of a guilty "in fact" party actually profiting from his crime where the attorney's negligence was directed to a non-factual aspect of the criminal defense

Id., 621 A.2d at 112-13. The Pennsylvania Supreme Court appropriately balanced a plaintiff's right to bring a claim with a defendant's right to be put on notice of a claim and the interest of avoiding litigation of stale claims. Pennsylvania has a Writ procedure which allows the plaintiff to file a notice of a claim without asserting the facts supporting the elements of a cause of action. In these types of circumstances, this would place the defendant lawyer on notice to maintain files and information with respect to a representation. The Pennsylvania Supreme Court clearly considered these issues in holding that the cause of action accrued at the latest at the time of the termination of representation. Therefore, the Pennsylvania courts had rational reasons related to legitimate government interests in deciding the accrual period for claims against lawyers. Accordingly, the statute of limitations accrual period for legal malpractice claims is constitutional. Petitioner has not met his burden of establishing that there is no rational reason related to legitimate government interests in this matter. Accordingly, the lower courts appropriately ruled and there is no compelling reason justifying additional review. Accordingly, this Petition should be denied.

II. Petitioner has failed to plead any proper jurisdictional basis for this Court to hear these state law claims

Petitioner's attempt to have this Court consider whether or not the statute of limitations for legal malpractice claims violates Equal Protection and the *Constitution of the Commonwealth of Pennsylvania* must fail as there is no proper jurisdictional basis. The United States Supreme Court may review judgments rendered by state courts under 28 U.S.C. §1257. The section permits review by certiorari of a final judgment of the highest court of a state that is premised on federal law or where the validity of a state statute is violative of federal law or the Constitution. The decisions by the Pennsylvania appellate courts at issue in this Petition for Writ of Certiorari were based exclusively on state law claims. There is no reference in the decisions of the Pennsylvania appellate courts to any federal law, including the federal equal protection and due process clauses. More importantly, 28 U.S.C. §1257 only permits this Court to review decisions of the highest court of a state which concern federal law. Further, Petitioner is not complaining that the terms of the state law statute of limitations violate federal law. Rather, the Petitioner appears to be complaining that the Pennsylvania Supreme Court's holding of the elements for a state law claim of legal malpractice violates due process. This is entirely a state law issue and does not implicate federal law in any way and 28 U.S.C. §1257 does not confer jurisdiction on this Court to hear this claim.

Finally, by definition, Petitioner's claim that the application of the statute of limitations denies him rights under the Constitution of the Commonwealth of Pennsylvania is a state law claim, and 28 U.S.C. §1257 will not

confer jurisdiction upon this Court to entertain such a claim. Therefore, this Petition should be denied.

CONCLUSION

Because the state courts have properly ruled regarding this state law issue, and no federal constitutional violation occurred, this Court should deny the Petition.

Respectfully submitted,

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